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CONSTITUTIONAL LIMITATIONS ON THE REGULATION OF CORPORATIONS.

To attempt to add anything to the mass of matter on this much mooted question does not seem wholly compatible with that modesty which should characterize the ordinary practitioner. If an excuse is necessary, it is not sufficient for the writer to say that the editors asked him to write and that he did so in compliance with their wishes. Such an answer while betokening amiability would hardly suffice to explain why he should be willing to add to an already dreary mass of matter, most of it unread.

My sole excuse must be briefly this: The growth of wealth, especially corporate wealth, in America has been to a great extent treated as an isolated and extraordinary condition, requiring very radical treatment. Denunciatory declamations and radical schemes have created an atmosphere in regard to corporate wealth almost as inflammable as that engendered by the polemical controversies of past ages. In such an atmosphere calm discussion has not flourished. Yet, if conditions have changed rapidly in our country in recent years, I am unable to see that there need be any great revolution either in our political principles or in the general trend of our legislation. Nor can I believe that the restrictions imbedded in our National Constitution representing the ideas of former generations will seriously interfere with any sound solution of present problems.

The practical questions arising would seem scarcely to involve questions of principle at all, but rather the varying degrees of actual control which the Government should exercise over commercial affairs.

It being once admitted, as it must be, that some degree of control is necessary, the question becomes wholly one of expedi-

ency. While not prepared to go as far as the Oxford student who said: "There is nothing new, nothing true and it is no matter," one cannot but believe that the questions presented can be solved better by an optimistic opportunism than by attempting to resort to logical deductions from any system of dogmatic, political philosophy or doctrinaire criticism. Better that we should stick to the spirit of our truly illogical, unsymmetrical but essentially practical, legal institutions.

The growing supervision and regulation by the Government, State, National and Local, of corporations, is no isolated phenomenon, but part of a general movement in the direction of what the French aptly call "collectivism." The real or supposed evils aimed at in the regulating or supervisory legislation are not due to anything inherent in corporations as such, but are rather owing to industrial and economic changes which have profoundly altered the conditions of industrial activity and commercial intercourse within the last half century.

The rules of the road were simple and required little legislation when the use of the highways was confined to pedestrians and quadrupeds, but the advent of the automobile has necessitated new legislation. Difficult questions of speed and highway regulation have arisen because the highways have been put to a use which could not possibly have been foreseen when they were originally created. This new class of legislation is, therefore, directly due to mechanical invention resulting in a new means of transportation.

The old British or American stage coach line when owned by an individual or by a company required in its nature little regulation. It did not need to be clothed with the power of eminent domain, nor did it interfere with private property or endanger life and limb.

The railroad, because of its vastness, requires an enormous wealth which individuals do not commonly possess, and a centralized ownership and operation which is not attainable by individuals associated in a partnership. Therefore the corporate form is the one which it necessarily assumes. But could a railroad conceivably be operated by unincorporate individuals, it would still require regulation by the State.

The present agitation against corporations is due largely to the belief that great aggregates of wealth, whether individual or collective, are obtaining by illegitimate methods privileges which the law should not allow them.

The agitation concerning corporations is only a portion of the much greater movement which is setting at naught old standards and ancient opinions, because the conditions which gave rise to those standards and opinions have disappeared and new ones are taking their place. It is part of the constant process by which society adapts itself to new conditions. On all sides it is admitted that corporations require more or less regulation depending in a great degree upon their functions, some of them doing nothing more than the ordinary business which may be done nearly, if not quite, as well by individuals, and others performing great public services which might, and in some countries actually are, performed by the State itself.

It is thus impossible to fix any rule as to restrictive legislation which would apply to all corporations as a single class.

Much confusion of thought not only in the public mind but in the judicial decisions would seem to have arisen by reason of a legal fiction. The fact that legal fiction is necessary to the growth and development of law, as Maine urges, and does not merely conceal a usurpation on the part of the Judges, as Bentham thought, may be generally admitted, but that many fictions, while they may have been useful, have become destructive of clear thinking is equally true.

The fiction that a corporation is a person has entailed its share of confusion. A corporation is not a person, but the law has used the expression "artificial personality" to convey the view that persons collectively engaged in an enterprise and endowed by the State with corporate powers, should, as far as their rights and duties are concerned, be assimilated in many respects to the legal position of the individual. That the two spheres are in no wise coextensive is, of course, admitted. The individual's liability, unless he be under tutelage of some kind is generally speaking unrestricted; that of the corporation is limited; the life of the individual is dependent upon the event of death; that of the corporation may be extended indefinitely at the will of the State. The artificial personality fiction, therefore, is a mere reasoning by analogy; helpful when its real character is remembered; dangerous when it is taken to represent a real situation.

As was said in the Dartmouth College case:

> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."[1]

[1] (1819) 4 Wheat. 518, 636.

In other words, it is a group of property rights and obligations which the law has seen fit to confer upon certain individuals and their successors.

Whatever the soundness of the doctrine of natural rights may be, no one has ever contended that a corporation is endowed with those inalienable attributes which belong to the human biped, if the Declaration of Independence is to be believed. It is thus well to remember *in foro* that a corporation is spoken of as an "artificial person" only by the use of a legal fiction and that when we come to analyze its rights and obligations we must not confuse the corporate existence with that of the natural person.

Two questions confront us in considering the corporation problem. The first belongs to the domain of social science, the second more strictly to that of the law.

1. How far does expediency and the public good require that public corporations shall be restricted in the use of their property rights and the exercise of their corporate franchise and attributes?

2. How far under our constitutions are corporations protected from legislative interference?

The answer to the first question must be determined largely by the point of view from which it is approached. There exists the widest divergence of opinion, ranging from those who believe that the State should exercise nothing but the merest police functions and whose views have been philosophically and admirably stated in Spencer's Social Statics up to those who believe that the State should assume charge of all public enterprises, such as railroads, telegraphs, gas companies, etc., and should vigorously regulate all large agglomerations of capital.

The average thinking individual holds some opinion between these two extremes.

Taine says: "*les idees font les passions*," and ideas ultimately depend largely upon economic conditions. Legislation must finally depend upon public opinion and the public opinion of to-day is in a state of flux. The *laissez faire* of the Benthamite school has been left far behind and the trend to-day is strongly toward collectivism. This is not due to any new arguments but to changed conditions, which made it necessary to violate the *laissez faire* doctrine in so many particulars that it finally lost its authority. Public schools, hospitals, compulsory vaccination and many other things generally recognized as wise, salutary and even essential by the community would fall under the ban of the principles laid down by Bentham, Mill and Spencer.

How far, therefore, corporations should be restricted, should not to-day be determined as a matter of theory or of deduction from general principles, but simply as questions of expediency. What expediency requires will finally depend upon the dominant public opinion of the age.

The change of opinion in regard to interference with the liberty of action of the individual, whether embodied in corporate form or not, is no new phenomenon peculiar to America. It seems to have alarmed many of our good citizens, but a slight examination of recent foreign legislation will show them that so far America has lagged behind the procession, and conservative England, as well as supposedly radical France, have been far in the van.

The ideas expressed by the Manchester school ceased to effectively dominate English public opinion a generation ago, and when Mill finally admitted that protection might be justified under certain circumstances, he dealt a blow to the free trade doctrine such as it had never received from its sworn enemies.

English legislation while generally conservative in form is often radical in fact. As an instance, examine the legislation abolishing the remedies to collect tithes but allowing the right to them to stand on the Statute Books, thus satisfying reformers by abolishing the actual cause of complaint and saving the feelings of the churchmen by recognizing the continuing legal existence of the tithes themselves.

The Irish Land Acts, purely confiscatory, would certainly in this country have been considered unconstitutional, and we find to-day the English farmers asking for a measure of State help which even our parlor socialists have not yet dared to advocate.

The dominant party in France are proposing old age pensions and a generally compulsory eight hour law. Yet France contains 2,000,000 small peasant proprietors, a conservative tendency such as is found perhaps nowhere else.

The present anti-corporation agitation, therefore, in America is part of a general world movement due to changed economic conditions. I have no right to speak as a sociologist, and, therefore, cannot answer the question as to how far the State should regulate the great interstate corporations possessing public or quasi-public functions. It is safe to say that the matter has become, except in the case of the extremists who advocate State ownership, a matter of expediency with a leaning in favor of

strong supervision and regulation for the purpose of securing equal treatment to all and reasonable profit to those who hold the franchises and have made the investment.

While the dead cannot govern the living, the opinions of past generations embodied in ancient laws and constitutions certainly serve as a check upon over hasty expressions of public opinion in the form of new laws. In America alone are these legal constitutional checks enforced by the judiciary. De-Tocqueville thought that the Department that had the power to interpret constitutions must ultimately become the ruling power in the State and said that if the French had adopted our system of permitting the judiciary to interpret fundamental law, France would have been governed by an oligarchy of judges. This has not, apparently at least, been the result in America, but the fact remains that here alone the judges in interpreting the constitutions may check legislation in a way not found elsewhere.

It is probable that nowhere is public opinion so quickly reflected in legislation as in England, by reason of the fact that the House of Commons directly representing the people is virtually omnipotent. In England, therefore, restrictions upon the regulation on supervision of corporations must ultimately rest wholly upon public opinion. Here, however, the wisdom of past generations embodied in our constitutions, however broadly interpreted, are bound to have great conservative influence. The conflicts in the Court to-day are largely between old opinions found in the fundamental law and new opinions finding expression in recent statutes.

The ideas underlying judge-made law are apt to be a generation or so behind the actual ethical notions of the day, and there is thus a continued friction between the law and opinion or between certainty and justice, a conflict seemingly necessary and inevitable in a changing and progressive civilization. A good instance of this is found in the case of Lochner *v.* New York, (1904) 198 U. S. 45. The ideas expressed in the opinion of the Court are those of the conservative or Manchester School, or the individualists, while Mr. Justice Holmes may be said to present in his dissenting opinion the more modern tendencies toward collectivism. The dissenting opinion says:

"I regret sincerely that I am unable to agree with the judgment in this case, and that I think it my duty to express my dissent.

"This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long

before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law. Jacobson *v.* Massachusetts, 197 U. S. 11. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. Northern Securities Co. *v.* United States, 193 U. S. 197. Two years ago we upheld the prohibition of sales of stock on margins or for future delivery in the constitution of California. Otis *v.* Parker, 187 U. S. 606. The decision sustaining an eight hour law for miners is still recent. Holden *v.* Hardy, 169 U. S. 366. Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire.*"

What in the main are the constitutional restrictions?

As most of the great corporations engage in interstate commerce, and are, therefore, subject to federal restrictions, I will mention them briefly.

As far as the Constitution limits the State Legislatures, these restrictions are embodied in the Fourteenth Amendment, which provides that the State cannot take property without due process of law or for public purposes without due compensation, must accord to all the equal protection of the laws and may not make or enforce any law abridging the privileges, rights and immunities of American Citizens.

An examination of the case law on this subject requires volumes. This little article at best is only intended to be suggestive.

How far these seemingly broad prohibitions may be frittered away in the application of the police power, is shown in the Slaughter House cases,[1] and how far in the name of the public interest is seen in the case of Munn *v.* Illinois.[2] The Courts are, of course, themselves, as all other bodies composed of individuals, greatly influenced by the current opinion of the day. Hence, their decisions under the Fourteenth Amendment do not remain

[1] (1872) 16 Wall. 36.

[2] (1876) 94 U. S. 113.

very far behind the general public opinion. The diversities of view on these questions are reflected in the Court in which many important cases of this kind are decided by a divided Court.

The extent to which the theory of the sanctity of private property may be disregarded, when it is a question of the abuses due to a certain kind of property, *viz.*, liquor, was well instanced in Mugler *v.* Kansas.[1]

In addition to the protection contained in the Federal Constitution and in the various State Constitutions against confiscation, there are certain procedural immunities which may be and often are invoked by foreign corporations. These immunities are mainly contained in the Fourth and Fifth Amendments to the National Constitution, providing against unreasonable searches and seizures and also against compelling a person to be a witness against himself.

How far these immunities of the individual might be used to protect the corporation against all inquiry into its affairs by the Federal Government if the fiction of artificial personality were treated as a reality, can easily be seen by the recent and most interesting case of Hale *v.* Henkel, 201 U. S. 43. Agents of the tobacco trust in an investigation before the Grand Jury had refused to answer certain questions and to produce certain books on the ground that they were privileged under the Fourth and Fifth Amendments to the Constitution. It seems clear that had the procedure been against individuals the position would have been well taken. The Court, however, in a most interesting opinion, by Mr. Justice Brown, while admitting that the witness was protected as far as he was himself concerned, yet could not plead immunity of the corporation of which he was merely an agent. As to the production of the books and papers of the corporation the learned justice distinguished clearly between the corporation and the individual. His language makes it very evident that he takes the view that the fiction of artificial personality is merely a convenient analogy as an aid in legal reasoning but is not to be pushed to its logical extreme. He says:

"The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. * * * * His rights are such as existed by the law of the land long antecedent to the organization of the State, and can only be taken from him by due process of law, and in accordance with the Constitution. * * * *

[1] (1887) 123 U. S. 623.

"Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. * * * *

"While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges."[1]

Mr. Justice Harlan concurring in the decision in this case holds that a corporation is not included at all in the words of the Fourth Amendment: "the right of the people to be secure in their persons, houses, papers and effects," etc., contending that corporations were not part of the people who established the union. While that is doubtless so, many excellent people firmly believe that corporations now have as much if not more to do with the government of the union than the people themselves.

The two dissenting justices in this case took the view that the Amendments applied to natural and artificial persons alike and that no distinction could be made against the rights of the corporation in this respect.

Should this latter view have prevailed, it would have gone far to protect the corporations from restrictive legislation. It seems to us that this result would not only have been unfortunate in the present state of opinion, but would have been the result of treating as a reality a mere fiction used by lawyers for purposes of practical convenience and which should cease to apply when it no longer squares with the facts.

To take the property of a corporation would be to deprive the beneficial owners, that is to say the individual stockholders, of their property and would thus defeat one of the ends for which the Bill of Rights was devised. Individual liberty is doubtless as important to our national development to-day as it ever was, but it is often invoked as a pretext for doing away with real liberty. The right of a person to be free in his house from the danger of being arrested on a general warrant and having his private and personal papers examined and confiscated is something very different from the right and duty of the State to examine into and control the actions, operations and transactions of enormous aggregates of wealth, enjoying legislative privileges, some of them performing quasi-public functions and many others having become virtually capitalistic monopolies. A

[1] (1905) 201 U. S. 43, 74–75.

corporation is more than a person and less than a person, but it is in no real sense a person.

To invoke the immunities in favor of individual liberty against supervision on the part of the State would be to use these very liberties as instruments of oppression.

The danger to individual liberty is believed no longer to lie in the direct action of officials of the Government, but rather in the action of the great commercial associations in competition with whom the individual man is necessarily reduced to insignificance.

The decision of the Court, therefore, in the case above mentioned and the statement of Mr. Justice Brown of the difference between artificial personalities and the individual would seem to be sound political science as well as good common sense. Under such a view it will be impossible to use the Fourth and Fifth Amendments as a shield against that regulation and supervision which it is generally admitted by disinterested persons should be exercised in regard to many corporations. This supervision is not to destroy but to preserve individual rights.

In ultimate analysis all rights must be held by individual men. An inanimate thing or a mere mental concept cannot be held to possess rights; the creation of a corporation simply means that certain individuals have agreed to do business in a certain form permitted by the State. They are given certain privileges; in return they should clearly understand that they have chosen to do their business in that way (*viz.*, in corporate form), and that they must submit to incidents to which the individual would not be compelled to submit.

On the whole, it would seem that those who have contended for corporate legislation have not been the opponents of individual liberty. The logical individualist would call for the abolition of all laws permitting incorporation. But because a useful device has in many cases been allowed to become harmful, must it be destroyed? Some of the evil can be cured by ridding ourselves of the pernicious results of a much misunderstood fiction.

Changed conditions have created new dangers and the man is no longer confronted by the State alone, *i.e.*, organized Society, but by that third factor in the problem "the corporation," *i.e.*, organized wealth.

The person who wishes to engage in the rum or the opium trade, finds himself hedged about by certain restrictions, enacted in the belief that they are beneficial for the community as a

whole. No plea based upon the individualistic doctrines of the Manchester school, however hard the restrictions may bear on the man who wishes to trade in those articles, will help the illicit distiller or the unlicensed saloon keeper.

Is the regulation of railroad rates by the Federal Government or the supervision of grain elevator charges by the State Government any more contrary to our fundamental principles of individual liberty? I think not. Both classes of regulations would seem to be based upon the idea of the general good of the community. That certain regulations affecting the individual, as we have seen in the case of Lockner *v.* New York, may go to the point of being oppressive, tyrannical and confiscatory is possible. This is, of course, also true of legislation in regard to corporations, but in neither case is any real question of principle involved. The only question is as to how far regulation should go. The important thing to remember is that what may be unconstitutional in the case of men doing business as mere individuals, may be quite proper when they adopt the form and privilege of incorporation.

It is utterly impossible to lay down any theoretical criterion which can help us much in arriving at a solution. Fortunately for us our Supreme Court has been singularly free from all mere doctrinarianism and has as each case arose adopted a practical view. The law has thus been elastic and expansive even if by no means certain and we have been prepared to meet new conditions as they arose without the necessity for constitutional amendment.

Had our Courts taken the view that because it had been held that under certain sections of the Constitution a corporation is a person, therefore the law knows no difference between the flesh and blood entity termed man and the artificial, legislative-created fiction called "corporation," the consequences would have been disastrous and only by constitutional amendment or by a revolution could the dominant opinion of the day have been able to express itself in the form of law.

As illustrative of the present tendency to check and regulate wealth generally may be mentioned the remarks of the President as to his personal belief in the wisdom of some legislation to check fortunes swollen beyond healthy limits. This was hailed by many as a most radical statement, and yet in so doing we would be only following the principle embodied in the Code Napoleon and which has had most admirable results in France.

In order to check the evils resulting from primogeniture that Code provided that parents must divide their property among their children, reserving liberty of disposition of a certain fraction only. These provisions have resulted in dividing large estates and creating a greater equality of fortune.

Whether the President had this particular expedient in mind or some scheme of taxation in the nature of a progressive inheritance tax by which a large portion of great fortunes should be lopped off by the State before they are turned over to the legatees, I do not know. In any event his utterances are significant of the trend of opinion and indicate that the abuses aimed at do not come from the growth of corporations but from the sudden growth of wealth which naturally has taken to a great extent the corporate form, which insures permanency in time and unity in action. In such form it can be more easily and promptly regulated than when in the hands of individuals.

The law cannot permanently prevent any dominant opinion from finding expression in legislation or judicial decisions, but it can check and delay the expression of such an opinion so that it may become by public discussion and reflection matured and modified. This great service our Courts in their interpretation of our Constitution may on the whole be said to have rendered in the past. There is no reason for supposing that they will not continue to do so in the future. To expect them to act as logic machines before which all questions of disputed right may be determined is merely chimerical. They often represent the opinions of the past, interpreted by the opinions of to-day, and the result is a kind of compromise between the two, which while neither logical, symmetrical nor homogeneous may be and usually is extremely useful as a good present working solution.

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